

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-108 ✓

In re Application of

UNION
BROADCASTING, INC.
(hereafter "Union")

File No. BMPH-921014IF

For Modification of Construction
Permit for Station WRAJ-FM,
Channel 243C2, Anna, Illinois

HEARING DESIGNATION ORDER

Adopted: April 7, 1993;

Released: April 15, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned application for a modification of a construction permit for Station WRAJ-FM filed by Union Broadcasting, Inc. W. Russell Withers, Jr. ("Withers") opposes grant of Union's application.¹

2. By way of background, Union currently holds a construction permit (File No. BPH-890531IB) for a new FM station on Channel 242 in Anna, Illinois. On October 14, 1992, Union filed the instant application to modify the permit by locating on a taller tower and thereby increasing the antenna height above average terrain (HAAT) from 227 meters to 275 meters. The taller tower is at a location which is virtually identical to that in the granted permit.² Withers, licensee of Stations KAPE(AM) and KGMO(FM), Cape Girardeau, Missouri, owns the tower site specified by Union. In fact, Withers owns both sites in question here, the "old" KGMO tower and the adjacent and taller "new" KGMO tower. According to Withers, although he agreed to let Union use the "old" tower, he has not given permission to use the "new" tower specified by Union. Union disputes this, insisting that it has the right to use the "new" tower.

3. Union argues that Withers' allegations are baseless and may have been advanced "solely for anticompetitive purposes." It references an "executed option agreement" for WRAJ use of the "new" tower.³ According to Union this option agreement has been executed by J.W. Davis ("Da-

vis"), Engineering Director of WSIL, Inc., and by Withers. Union asserts that it intends to "pursue its rights" under this agreement.

4. Withers argues that use of the "new" tower would not even have been contemplated until Union conducted a stress test, which it never did. According to Withers, such a test would have shown that the new tower could not accommodate the WRAJ antenna. Withers references a joint statement by himself and Davis, which, in paragraph 8, "makes clear that there was no contemplation" for placing the WRAJ antenna on the "new" tower. Withers also cites the "actual" Option for Tower Lease and Exhibit A thereto, the "initialed agreement" with Union, paragraph 1 of which he claims clearly refers to the "old" tower. According to Withers, Union's Exhibit A was never executed and is Union's "wish list." Withers further asserts that the executed Exhibit A concerns the "old" tower and an antenna height of 500 feet as opposed to the 191 meters proposed in Union's application.

5. An examination of the copy of the Option for Tower Lease presented by Union reveals that it was apparently executed by Davis and Union's representative on January 2, 1992. Union is granted therein the right to enter a Tower Lease Agreement, a copy of which is attached as Exhibit A. As indicated above, Union's Exhibit A is not signed by either party. Similarly, the copy of Exhibit A attached to the executed Option for Tower Lease presented by Withers references the "K10 KM" transmitter site which, according to Withers, is the "old" tower. While the copies of the "Option and Lease Agreement" presented by the parties appear to be identical,⁴ the "Exhibit A's" submitted by each party are clearly different documents. In light of this as well as the fact that the parties present divergent characterizations of any understanding they may have concerning the intended tower site, it appears that an appropriate determination as to Union's legal right to utilize the antenna site specified in its application cannot be made absent further inquiry by the Commission.

6. The Commission requires assurance that a broadcast applicant's proposed transmitter site will be available should it eventually receive a grant. *Arizona Number One Radio, Inc.*, 102 FCC 2d 550, 556 (Rev. Bd. 1986), *aff'd*, 2 FCC Rcd 44 (1987). Although an applicant need not demonstrate a "binding agreement" or "absolute assurance" of site availability there must be at least a meeting of the minds between the applicant and the party controlling the site regarding key lease terms. *See Progressive Communications, Inc.*, ("Progressive"), 61 RR 2d 560 (Rev. Bd. 1986). Here, the fact that the site owner, Withers, and Union cannot even agree on the identity of the tower to be leased belies any reasonable possibility that all key lease terms have been agreed to. The contradictory assertions of Withers and Union raise a substantial and material question of fact as to the latter's reasonable assurance as to the avail-

¹ Withers submitted a letter on October 22, 1992 opposing a grant. On November 2, 1992, Union responded by letter, to which Withers, in turn, replied by letter on January 22, 1993.

² Union's engineering statement indicates that the new tower is at essentially the same geographic coordinates as the old tower, being but 0.5 seconds of latitude and longitude apart. Staff study confirms this statement: both sites are listed at 37 degrees 22 minutes 16 seconds north latitude and 89 degrees 31

minutes 52 seconds west longitude.

³ Union attaches to its response an "Option for Tower Lease" signed by J.W. Davis and Union Principal Daniel S. Stratemeyer on January 2, 1992. Exhibit A to this document, entitled "Tower Lease Agreement," is not signed.

⁴ The "Option for Tower Lease" submitted by Union is signed and dated on page two; that version submitted by Withers is signed but undated on page 2.

ability of the proposed site. Accordingly, the appropriate course of action is to resolve the site availability issue in the context of an evidentiary hearing. *Progressive*, at 563.

7. Withers' opposition to the captioned application can be considered as an informal objection to a grant pursuant to 47 C.F.R. §73.3587. In this regard, the evidence he presents in contradiction to Union's claim of a binding lease agreement for the "new" tower raises a substantial and material question of fact pursuant to §309(e) of the Communications Act of 1934, as amended. This statutory provision also mandates designation of the application.

8. Except as indicated by the issue specified below, Union is qualified to construct and operate as proposed. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the application of Union Broadcasting, Inc. IS DESIGNATED FOR HEARING IN A PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order upon the following issues:

1. to determine whether or not Union has reasonable assurance that the site specified in its application will be available to it.
2. To determine, in light of the evidence adduced pursuant to issue 1, above, whether Union is qualified to construct and operate the facilities sought herein.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this *Order* shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7202, Washington D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this *Order* shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That to avail itself of the opportunity to be heard, the applicant shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this *Order*, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in the *Order*.

11. IT IS FURTHER ORDERED, That the applicant shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau